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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FIVE

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| THE PEOPLE,<br>Plaintiff and Respondent,<br>v.<br>LAZARO B. GUZMAN,<br>Defendant and Appellant. | A150834<br><br>(Alameda County<br>Super. Ct. No. C-176702) |

A jury convicted Lazaro B. Guzman of 11 sexual offenses against two children, C. Doe (C.) and M. Doe (M.) and found several enhancement allegations true. The trial court sentenced Guzman to 75 years to life in state prison. Guzman appeals. He challenges the consolidation of the charges and raises claims of evidentiary and instructional error. We strike the jury's finding regarding the use of obscene material in the commission of count 6 (Pen. Code, § 1203.066, subd. (a)(9))[1] and the jury's multiple victim finding in count 9 (§ 667.61, subd. (e)). In all other respects, we affirm.

FACTUAL AND PROCEDURAL BACKGROUND

An amended consolidated information charged Guzman with 11 felonies, seven against C. and four against M. As to C., the prosecution charged Guzman with six counts of committing a lewd or lascivious act upon a child under age 14 (§ 288, subd. (a), counts 1 through 6). On count 6, the information alleged Guzman used obscene material in the commission of the lewd act (§ 1203.066, subd. (a)(9)). Count 7 charged Guzman with

[1] Undesignated statutory references are to the Penal Code.

aggravated sexual assault of a child under age 14 (§ 269, subd. (a)(4)). As to M., the prosecution charged Guzman with three counts of committing a lewd or lascivious act upon a child under age 14 (§ 288, subd. (a), counts 8, 10, 11). Count 9 charged Guzman with continuous sexual abuse of M., a child under age 14 (§ 288.5, subd. (a)).

*Overview of Trial Testimony*

We provide an overview of the trial testimony, reciting the evidence in the light most favorable to the judgment.

A. Sexual Abuse of C. Doe

Guzman and C.'s mother are cousins. C. referred to Guzman as his "cool uncle" and "looked up to him." In 2004 or 2005, C.'s mother was hosting a party at her apartment. Guzman was at the party. C.—then five or six years old—was asleep in his mother's bed, wearing pajamas. C. woke up because Guzman was "grabbing [his] butt." Guzman kissed C., putting his tongue inside C.'s mouth. Guzman pulled down C.'s pajamas and put his hands on C.'s buttocks. Then Guzman put his penis in C.'s butt and began moving "back and forth." It was painful. C. went to the bathroom. Guzman followed, shutting and locking the door behind him. Guzman put his penis in C.'s "butt," moving "back and forth." C. went back to the bed. Guzman followed him, and put his penis in C.'s "butt" a third time. Eventually, C. fell asleep. Guzman repeatedly told C. not to tell anyone what happened because he would "go to jail."

Another time, C.'s mother dropped C. off at Guzman's house and left to run errands. Guzman showed C. a pornographic video. He pulled down C.'s pants and "forced" his penis into C.'s butt and moved "back and forth." C. asked Guzman to stop because it hurt; Guzman said he " 'was almost done.' " Guzman got up and went into the bathroom.

When C. was about eight years old, C.'s mother invited Guzman over for a pumpkin carving contest. That evening, when Guzman and C. were alone together, Guzman pulled down his own pants, grabbed the back of C.'s head, and put his penis in C.'s mouth. C. tried, unsuccessfully, "to push away from" Guzman. Guzman stopped when he heard C.'s mother return. Guzman told C. not to tell his mother what happened.

Later, C. and Guzman were at a relative's house for a birthday celebration. Guzman told C. to go into a different room so C. could orally copulate him. C. knew Guzman's request "wasn't right," so he refused. After the incident, C. left the room whenever he found himself alone with Guzman. C. "didn't want anything to happen."

When C. was 15, he attended a vocational training program where he was "going to have to sleep in a room" with men he "didn't . . . know." C. was worried and uncomfortable. On the first day of the program, an instructor thought C. was wearing his pants too low, so the instructor pulled up C.'s pants. C. became so upset that he called his mother and left the program. The next day, C.'s mother told him he would have to return to the program. In response, C. told his mother what Guzman had done. C. could not "keep it in anymore." He was sad, and angry at himself because he felt the abuse was his fault. C. did not feel comfortable talking about it. C.'s mother noticed a change in C.'s personality starting in first grade, which coincided with the abuse. C., who had been happy and outgoing, became withdrawn.

B. Sexual Abuse of M.

Guzman is M.'s cousin. In 2004, M. was 10 years old and Guzman was 21. Guzman kissed M. and asked her if she wanted to be his girlfriend. She agreed. Guzman told M. to keep their relationship "a secret because people wouldn't understand." M. kept quiet because she knew their relationship was "not something the law permit[ted]" and she did not want Guzman "to go to jail."

In the summer of 2004, M. and her brother attended a sleepover at Guzman's sister's apartment. Guzman was there; he watched a movie with M. and her brother. After M.'s brother fell asleep, Guzman led M. into a bedroom and asked her to have sex with him. M. reluctantly agreed and they had sex. It felt uncomfortable and she asked Guzman to stop. He replied, " 'I'm almost done.' " When Guzman finished, he got dressed and said his sister's husband was almost home. Then he left the apartment.

Before her 11th birthday, Guzman told M. he had a birthday gift for her. Guzman took M. to the boiler room of his sister's apartment building and locked the door. He gave M. a pendant and told her to turn around so he could put it on. Then he told M. to

get on her knees. Guzman pulled down her pants. M. was nervous because she thought they "were going to have sex again." Guzman inserted his penis into M.'s anus. Then they got dressed and left the boiler room.

Guzman and M. attended a family gathering in December 2004. Guzman told M. to go into one of the bedrooms later in the evening, when "everybody else was more drunk." M. complied. Guzman—who was outside— met M. at the bedroom window. As M. sat on the window ledge, Guzman digitally penetrated M.'s vagina and kissed her until someone opened the bedroom door.

In May 2005, M. and her brothers were at their apartment. M. was in the living room; her brothers were in their bedroom. Shortly after M.'s father left, Guzman arrived. He kissed M. and they had intercourse on the living room floor. Then they had anal sex. M. believed she was in love with Guzman and that they "were in a real relationship." During the summer of 2005, M. and Guzman had sex numerous times, often at her apartment, while her parents were at work. M. hid her actions from her family.

Guzman repeatedly asked M. to let him spend the night at her family's apartment. M. had previously agreed, but had never followed through because she "was scared about getting caught." In October 2005, M. let Guzman into her family's apartment through a side door and hid him in the closet. While her family slept, M. and Guzman had sex. M. was nervous because "it was very risky." The plan was for Guzman to sneak out before her family woke up, but M. and Guzman overslept. Guzman hid in the closet, waiting for M.'s family to leave. M.'s mother opened the closet "to get some shoes," saw Guzman, and "started yelling, asking why he was here." M.'s father came into the room. He was "very mad." He punched and kicked Guzman. Other family members arrived and everyone "started arguing [about] why [Guzman] was there." M. lied and told her family that Guzman had arrived at the apartment, drunk, and that she had hidden him in the closet.

Eventually, Guzman left the apartment. He disappeared from M.'s life for several months. M. learned that Guzman "was going to be kicked out of [his] house and he was going to turn himself in." Around this time, Guzman told C.'s mother that he had been in

a physical altercation with M.'s father, and that he was "in trouble" because he had sex with M. and her family "knew what was going on."

In mid-2006, Guzman returned to Oakland. In June, M.—who was 12 years old—skipped school several times and had sex with Guzman. In August, M.'s family moved to Oregon "to get . . . away from [Guzman]." M. did not want to move, so she ran away and spent a week with Guzman. During that week, M. and Guzman had sexual intercourse several times.[2] Guzman planned to "leave the state" with M. Eventually, however, M. returned home and moved with her family to Oregon. In Oregon, M. went to a Child Abuse Response and Evaluation Services facility, where she provided some information about her relationship with Guzman. M. withheld details because she did not want Guzman "to get in trouble." M. had sexual intercourse with Guzman in Oregon, and once in Oakland. When M. was 16 years old, she decided to "cut all ties" with Guzman because his "demands . . . didn't make sense anymore."

C. Defense Testimony

Guzman denied sexually abusing C. He also denied having a sexual relationship with M. before 2011. Guzman claimed he entered M.'s apartment in 2004 by mistake, when he was drunk. M.'s father hit Guzman, for reasons Guzman did not understand. Guzman moved to Reno after hearing rumors about his involvement with M. Guzman claimed he moved to Reno to work, and to "get away" from the "tense environment" created by M.'s father. Guzman returned to Oakland in 2006. He admitted writing a love letter and giving it to M. in 2006. Guzman's wife and sister testified on Guzman's behalf.

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[2] M.'s mother collected the clothes and underwear M. was wearing and stored them in a bag until several years later, when M.'s mother learned Guzman was being investigated by law enforcement. An Oakland Police Department criminalist performed a DNA analysis on semen found on M.'s underwear. The DNA profile matched Guzman. In 2005 and 2006, Guzman gave M. cards and handwritten letters professing his love for, and devotion to, her.

In 2004, Guzman's friend, Carlos Calamateo, hosted a party for Guzman. Calamateo overheard Guzman admit that he liked having sex with kids.

D. Verdict and Sentence

In October 2016, the jury convicted Guzman of the charges. The jury found various enhancement allegations true, including that the offenses were committed against multiple victims (§ 667.61, subd. (e)), and that Guzman used obscene material in the commission of count 6 (§ 1203.066, subd. (a)(9)). The court sentenced Guzman to 75 years to life in state prison, consisting of a determinate term of 30 years and an indeterminate term of 45 years to life.

## DISCUSSION

### I.

### *No Abuse of Discretion in Consolidating the Charges*

In July 2015, the prosecution filed an information charging Guzman with crimes against C. In November 2015, the prosecution filed a second information charging Guzman with crimes against M. After preliminary hearings in both cases, the prosecution moved to consolidate the charges, arguing the evidence in both cases was "cross-admissible," the evidence was not "[u]nusually [i]nflammatory," and neither case was "inordinately weak or strong." The court consolidated the charges over Guzman's objection.

An accusatory pleading may charge two or more different offenses "of the same class of crimes or offenses." (§ 954.) The crimes here were of the same class. (*People v. Nguyen* (2010) 184 Cal.App.4th 1096, 1112.) We review the court's decision to join the charges for abuse of discretion. As relevant here, "[r]efusal to sever may be an abuse of discretion where: (1) evidence on the crimes to be jointly tried would not be cross-admissible in separate trials; (2) certain of the charges are unusually likely to inflame the jury against the defendant; [and] (3) a 'weak' case has been joined with a 'strong' case, or with another 'weak' case, so that the 'spillover' effect of aggregate evidence on several charges might well alter the outcome of some or all of the charges[.]" (*People v. Sandoval* (1992) 4 Cal.4th 155, 172–173.)

Guzman argues the court erred by consolidating the charges because the offenses were not cross-admissible. He is incorrect. Evidence Code section 1108 permits the jury

in a sexual offense case to consider evidence of other sexual offenses for any relevant purpose. (*People v. Falsetta* (1999) 21 Cal.4th 903, 911, 922.) Guzman seems to suggest the evidence was not cross-admissible because the crimes were motivated by "distinct sexual impulses." But Evidence Code section 1108 does not require a degree of similarity between the charged and uncharged offenses. (See *People v. Cordova* (2015) 62 Cal.4th 104, 114 [evidence of sexual assaults admissible notwithstanding differences in the victims' ages and genders].) In any event, the crimes here were similar in that Guzman took advantage of his position of trust to sexually abuse his young relatives. Contrary to Guzman's claim, the evidence was manifestly relevant.[3]

Next, Guzman contends it was improper to consolidate C.'s "weak" case with M.'s "[s]trong" case. We disagree. To "demonstrate the potential for a prejudicial spillover effect, defendant must show an 'extreme disparity' in the strength or inflammatory character of the evidence." (*People v. Ybarra* (2016) 245 Cal.App.4th 1420, 1436.) Guzman has not satisfied this burden. We have already concluded the evidence was equally inflammatory. Guzman's ad hominem attacks on C.'s credibility are not persuasive; the evidence as to M. was not significantly stronger than the evidence as to C. (*People v. Price, supra,* 1 Cal.4th at p. 389.) The court did not abuse its discretion by consolidating the charges. (*People v. Merriman* (2014) 60 Cal.4th 1, 38.)

We reject Guzman's contention that consolidation resulted in a trial that was fundamentally unfair. (See *People v. Mendoza* (2000) 24 Cal.4th 130, 161, superseded by statute on other grounds as stated in *People v. Brooks* (2017) 3 Cal.5th 1, 63, fn. 8.) Guzman's remaining arguments on this issue have been considered and merit no further discussion.

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[3] Guzman does not persuasively argue Evidence Code section 352 mandated exclusion of the offenses. (*People v. Branch* (2001) 91 Cal.App.4th 274, 281.) The sexual abuse occurred around the same time period, and the offenses were "equally abhorrent." (See *People v. Price* (1991) 1 Cal.4th 324, 389–390.) There was no risk of confusing the issues or consuming undue time.

II.

*No Error in Admitting Guzman's Statements to Carlos Calamateo*

A. Background

The prosecutor moved in limine to introduce evidence that Guzman admitted liking " 'little kids.' " According to the motion, Guzman attended a party hosted by Calamateo in 2003 or 2004. Calamateo heard Guzman say he "liked 'little kids' " and explained "he had sex with very young girls in Guatemala because it was so easy to do." The prosecutor argued the evidence was a party admission (Evid. Code, § 1220) and prior conduct offered to prove motive and intent (Evid. Code, § 1101, subd. (b)). Defense counsel argued the evidence was "unreliable" hearsay, inadmissible under Evidence Code section 352. The court admitted the evidence pursuant to Evidence Code sections 1220 and 1101, subdivision (b).

At trial, Calamateo testified he hosted a party in 2004, where he heard Guzman say "he likes . . . little, young womans, kids. . . . [¶] . . . [¶] [N]ine, 10 years old, 11 years old, something like that." Guzman also said "[i]t was easy to . . . get them into bed[.]" These comments angered Calamateo, who had two daughters. Calamateo told Guzman to "be careful." In response, Guzman suggested he was doing that "back in Guatemala." Calamateo, however, saw Guzman looking at M. during the party in a "suspicious" way that worried Calamateo. The prosecution offered a transcript of Calamateo's police interview, where Calamateo said Guzman commented he "likes to . . . have sex with . . . kids."

B. The Evidence Was Admissible under Evidence Code Section 1220 and Not Subject to Exclusion under Evidence Code Section 352

Guzman claims the court erred by admitting "Calamateo's hearsay testimony." We are not persuaded. "Evidence of a statement is not made inadmissible by the hearsay rule when offered against the declarant in an action to which he is a party . . . ." (Evid. Code, § 1220.) This hearsay "exception applies to all statements of the party against whom they are offered." Here, Guzman "made the statements, the statements were offered against [him], and [he] was a party to this action. Thus, the statements came

within an exception to the hearsay rule. [Citation.] They were admissible against [Guzman]." (*People v. Rodriguez* (2014) 58 Cal.4th 587, 637.) Calamateo's failure to recall the exact words Guzman used does not render the statements inadmissible, nor does the fact that Calamateo translated Guzman's statements from Spanish to English. (See *People v. Cortez* (2016) 63 Cal.4th 101, 126; *People v. Kraft* (2000) 23 Cal.4th 978, 1034–1035.)

"Under Evidence Code section 352, the trial court enjoys broad discretion in assessing whether the probative value of particular evidence is outweighed by concerns of undue prejudice[.]" (*People v. Rodrigues* (1994) 8 Cal.4th 1060, 1124.) The court's "exercise of that discretion 'must not be disturbed on appeal *except* on a showing that the court exercised its discretion in an arbitrary, capricious or patently absurd manner that resulted in a manifest miscarriage of justice.' " (*Id.* at pp. 1124–1125.) There was no abuse of discretion here. Guzman's comments were highly probative of his motive and intent in committing the sexual assaults. (See *People v. Memro* (1995) 11 Cal.4th 786, 863–864.) And the evidence, while obviously damaging to Guzman, was not unduly prejudicial under Evidence Code section 352. (See *People v. Johnson* (2010) 185 Cal.App.4th 520, 534.) Guzman's reliance on *People v. Albarran* (2007) 149 Cal.App.4th 214—which concerned the prejudicial effect of gang evidence—has no application here. The court did not abuse its discretion in admitting Calamateo's testimony. (*People v. Cortez, supra,* 63 Cal.4th at p. 125.)

III.

*No Error in Allowing Testimony on C.'s Demeanor*

A. Background

At trial, Officer Chavarria described her experience investigating sex crimes and using "CALICO" to interview children. Chavarria had observed about 50 interviews with teenagers who claimed they were sexually abused; she noted teenage boys tended to "act more shamed" and "embarrassed" and that they had "a harder time" discussing what "happened to them." The court overruled defense counsel's "improper opinion" objection and allowed Chavarria to testify based on her experience and training.

Chavarria arranged and observed C.'s CALICO interview. When asked to describe his demeanor, Chavarria testified C. "was embarrassed. Shamed, sad. He had a difficult time disclosing what happened to him. He was slumped over in his chair, had a difficult time making eye contact. He covered his face, he cried. He was emotional[.]" When Chavarria opined that she was not surprised by this behavior because C. "had horrible things done to him," the court sustained defense counsel's "vouching" objection and struck the testimony. Chavarria then clarified that C.'s behavior was not unusual in her experience with CALICO interviews of teenage boys.

Officer Tomlinson testified he met with C. in March 2015. When asked to describe C.'s demeanor, Tomlinson testified he was "very reserved, seemed very distraught. He cried for a little bit. [They] had to take some breaks . . . so that he could collect himself." C. seemed "very upset or disturbed." When Tomlinson testified "it's very hard for a young man, or really anybody, who's gone through a situation like this—" defense counsel objected. The court sustained the objection and struck the testimony.

B. No Error in Admitting Chavarria's Testimony

Guzman claims "Chavarria was not qualified to proffer" her opinions. We disagree. "[A] witness may provide an opinion if it is rationally based on what . . . she perceived and if it is helpful to a clear understanding of the testimony." (*People v. Houston* (2012) 54 Cal.4th 1186, 1221.) " '[A] witness may testify about objective behavior and describe behavior as being consistent with a state of mind.' " (*People v. Smith* (2015) 61 Cal.4th 18, 46.) Here, Chavarria did just that: she described C.'s demeanor—his posture, body language, and emotional state—during the CALICO interview based on her personal observations and her training and experience. (*People v. Farnam* (2002) 28 Cal.4th 107, 153.) She was not, as Guzman argues, testifying as an "expert in child psychology." Nor are we persuaded Chavarria was "vouching" for C. Chavarria did not express an opinion on C.'s veracity. Instead, she described how C. comported himself during the interview and contextualized his conduct with her observations of other teenage boys during CALICO interviews. (*People v. Houston, supra,* at pp. 1221–1222.)

*People v. Sergill* (1982) 138 Cal.App.3d 34 is easily distinguishable. There, two police officers testified the victim was "telling the truth," and the trial court told the jury one officer was "especially qualified to render his opinion as to whether a person reporting a crime was telling the truth." (*Id.* at pp. 40, 41.) Chavarria's testimony "bears no resemblance to the testimony found inadmissible in *Sergill*" (*People v. Rodriguez, supra,* 58 Cal.4th at p. 631) and the court here did not comment on Chavarria's qualification to opine on a witness's veracity.

IV.

*No Error in Giving Flight Instruction*

A. Background

The prosecution requested a flight instruction (CALCRIM No. 372). Defense counsel argued there was no "evidence of flight" because it was unclear "how soon after the closet incident" Guzman "moved to Reno" and because there was no "direct connection" between the incident and the move. The court concluded the evidence warranted the instruction, and instructed the jury: "If the defendant fled immediately after the crime was committed or after he was accused of committing the crime, that conduct may show that he was aware of his guilt. If you conclude that the defendant fled, it is up to you to decide the meaning and importance of that conduct. However, evidence that the defendant fled or tried to flee cannot prove guilt by itself."

During closing argument, the prosecutor told the jury to consider the instruction in connection with count 9, continuous sexual abuse of M. According to the prosecutor, Guzman moved after he was discovered in M.'s closet, "which is the end of the continuous sexual abus[e]. When he runs out of that closet and disappears." The prosecutor noted the jury could "consider the fact that the . . . evidence showed that he disappeared for a large portion of time before he popped back up some months later and started committing [counts] 10 and 11."

B. The Court Properly Instructed the Jury with CALCRIM No. 372

A " 'flight instruction "is proper where the evidence shows that the defendant departed the crime scene under circumstances suggesting that his movement was

motivated by a consciousness of guilt." ' [Citations.] Evidence that a defendant left the scene is not alone sufficient; instead, the circumstances of departure must suggest 'a purpose to avoid being observed or arrested.' [Citations.] To obtain the instruction, the prosecution need not prove the defendant in fact fled, i.e., departed the scene to avoid arrest, only that a jury *could* find the defendant fled and permissibly infer a consciousness of guilt from the evidence." (*People v. Bonilla* (2007) 41 Cal.4th 313, 328.)

We reject Guzman's contention that the instruction lacked a "factual basis." M. testified that after Guzman was discovered in her closet, he disappeared from her life. C.'s mother testified Guzman admitted having sex with M., and that he felt he was in trouble because M.'s family "knew what was going on." Guzman testified he moved to Reno after an altercation with M.'s parents; he acknowledged hearing rumors about his involvement with M. before moving.

The circumstances of Guzman's departure amply supported a reasonable inference of consciousness of guilt—that Guzman moved to Reno because he did not want the police to apprehend him. (*People v. Bonilla, supra,* 41 Cal.4th at p. 329.) That Guzman offered another explanation for the move "does not affect the propriety of the instruction. Alternative explanations for flight conduct go to the weight of the evidence, which is a matter for the jury, not the court, to decide." (*People v. Rhodes* (1989) 209 Cal.App.3d 1471, 1477.) Sufficient evidence supported the flight instruction. (*People v. Cage* (2015) 62 Cal.4th 256, 285.) The instruction was not, as Guzman claims, "erroneous as a matter of law." (See *People v. Price* (2017) 8 Cal.App.5th 409, 454–458.)

## V.

### *No Error in Instructing the Jury on Fresh Complaint Evidence*

### A. Background

Before trial, the court indicated it intended to give a fresh complaint limiting instruction. The parties agreed the instruction would apply to the testimony of C.'s mother. At trial, C.'s mother testified C. said something sexual had happened with Guzman, but she did not describe the specifics of the conversation. Defense counsel proposed a limiting instruction, but the court declined to give it. Instead, the court

instructed the jury: "You have heard evidence that C[.] made complaints of inappropriate sexual conduct by the defendant to his mother, . . . before he reported that conduct to the police. You may only consider that evidence to determine (a) [w]hether there was a complaint made; (b) [w]hen the complaint was made . . . [and;] (c) under what circumstances the complaint was made. You may not consider C[.]'s out of court complaint of inappropriate sexual conduct made to his mother prior to the report to the police for the truth of the matter asserted."

B. The Court Properly Instructed the Jury on Fresh Complaint Evidence

"[P]roof of an extrajudicial complaint, made by the victim of a sexual offense, disclosing the alleged assault, may be admissible for a limited, nonhearsay purpose—namely, to establish the fact of, and the circumstances surrounding, the victim's disclosure of the assault to others—whenever the fact that the disclosure was made and the circumstances under which it was made are relevant to the trier of fact's determination as to whether the offense occurred." (*People v. Brown* (1994) 8 Cal.4th 746, 749–750 (*Brown*).) The evidence is admissible only "for the limited purpose of showing that a complaint was made by the victim, and not for the truth of the matter stated. [Citation.] Evidence admitted pursuant to this doctrine may be considered by the trier of fact for the purpose of corroborating the victim's testimony, but not to prove the occurrence of the crime." (*People v. Ramirez* (2006) 143 Cal.App.4th 1512, 1522.) Thus, "only the fact that a complaint was made, and the circumstances surrounding its making, ordinarily are admissible; admission of evidence concerning details of the statements themselves, to prove the truth of the matter asserted, would violate the hearsay rule." (*Brown*, at p. 760.)

The instruction did not contravene *Brown*. *Brown* held that "[s]o long as the evidence that is admitted is carefully limited to the fact that a complaint was made, and to the circumstances surrounding the making of the complaint, thereby eliminating or at least minimizing the risk that the jury will rely upon the evidence for an impermissible hearsay purpose, admission of such relevant evidence should assist in enlightening the jury without improperly prejudicing the defendant." (*Brown*, *supra*, 8 Cal.4th at p. 762.)

The instruction here complied with *Brown*—it conveyed the limited purpose for which the jury could consider the fresh complaint evidence. The instruction did not foreclose Guzman's defense "that the allegations were made up or mis-remembered." In opening and closing arguments, defense counsel called attention to the delay between the abuse and C.'s complaint to his mother and suggested C. had a motive to lie.[4]

VI.

*Two of the Jury's Findings Must be Stricken*

The jury found true an allegation that Guzman used obscene matter in the commission of count 6, a lewd act against C. Guzman argues—and the Attorney General agrees—this finding must be stricken because the pornographic video Guzman showed C. was not obscene. We accept the Attorney General's concession and modify the judgment to strike the jury's true finding on the section 1203.066, subdivision (a)(9) allegation. The Attorney General also suggests the multiple victim allegation with respect to count 9 should "perhaps . . . be stricken." We also modify the judgment to strike the jury's true finding on the multiple victim allegation (§ 667.61, subd. (e)) as it pertains to count 9, continuous sexual abuse of M.

VII.

*The Parties' Respective Challenges to the Sentence Fail*

Guzman contends the court abused its discretion by sentencing him to the aggravated term on count 9, continuous sexual assault of M. The Attorney General disagrees, but argues resentencing is required because the court imposed the incorrect number of indeterminate terms.

[4] Guzman argues the court erred by giving a modified instruction modeled on CALCRIM No. 1191. This claim fails in light of *People v. Villatoro* (2012) 54 Cal.4th 1152, 1164–1165, 1167. We decline to conclude *Villatoro* is distinguishable or wrongly decided. We also reject Guzman's cumulative error claim. (See *People v. Woodruff* (2018) 5 Cal.5th 697, 783.)

A. Background

The prosecution urged the court to sentence Guzman to a determinate term of 34 years in prison, consisting of the upper term of 16 years on count 9, and an additional 18 years on all remaining convictions except count 7, aggravated sexual assault of C. On count 7, the prosecution urged the court to impose an indeterminate term of 15 years to life.

At the January 2017 sentencing hearing, the court announced its tentative sentencing decision and asked the parties whether they "wished to object, make a record," or whether they had "any issue or comments that they would like to make." The prosecutor responded, "[n]o" and defense counsel "[s]ubmitted." The court then adopted its tentative decision and imposed a determinate term of 30 years. The court used count 9 as the principal term. It imposed the upper term of 16 years for that conviction and noted numerous factors in aggravation, including (1) the "great degree of cruelty and callousness to the victims"; (2) the "extreme and long-standing emotional and psychological damage"; (3) the victims' vulnerability based on their age; (4) Guzman's abuse of a position of trust; (5) Guzman's "violent and predatory conduct over a span of multiple years, which indicate[d] that he is a serious danger to society"; and (6) Guzman's "brazen and outrageous acts" against both victims in their family homes with family members close by, which demonstrated he was "depraved and dangerous." The only mitigating factor, according to the court, was Guzman's lack of "significant criminal conduct."

The court imposed a total of 14 consecutive years on counts 1, 2, 4, 5, 6, 10, and 11. In support of its decision to impose consecutive sentences on these convictions, the court determined (1) the crimes were "predominantly independent of each other"; (2) each count involved "separate and distinct violent acts"; and (3) counts 6, 10, and 11 were committed at different times and places, suggesting Guzman's actions were not just one "instance of aberrant behavior." The court imposed an indeterminate term of 45 years to life, consisting of three consecutive sentences of 15 years to life on counts 3, 7, and 8.

B. The Aggravated Term on Count 9 Was Not an Abuse of Discretion

The court did not abuse its discretion in sentencing Guzman to the aggravated 16-year term on count 9. "Only a single aggravating factor is required to impose the upper term." (*People v. Osband* (1996) 13 Cal.4th 622, 728.) Here, the court recited several valid factors in aggravation, including Guzman's cruelty and callousness in committing the crime, and his abuse of a position of trust. These factors were not elements of the crime. (See *People v. Burbine* (2003) 106 Cal.App.4th 1250, 1262.) Neither the court's alleged improper reliance on factors Guzman deems "duplicative" and "inapplicable," nor his disagreement with the court's factual findings, provides a basis for reversal. (*Ibid.*) That the court declined to find additional mitigating factors does not demonstrate a prejudicial abuse of discretion. "Sentencing courts have wide discretion in weighing aggravating and mitigating factors" and "a trial court may 'minimize or even entirely disregard mitigating factors without stating its reasons.' " (*People v. Lai* (2006) 138 Cal.App.4th 1227, 1258.)

C. We Reject the Attorney General's Sentencing Claim

The Attorney General contends resentencing is required so the "court can substitute indeterminate prison terms for the determinate terms imposed on Counts 6, 10, and 11." We decline to address this argument. The court imposed determinate sentences on these convictions at the prosecution's behest. (See *People v. Crouch* (1982) 131 Cal.App.3d 902, 904–905.) When the court imposed the sentence—which included determinate terms on these convictions—the prosecution did not object, despite being given an opportunity to do so. (*People v. Scott* (1994) 9 Cal.4th 331, 353.)

The Attorney General did not appeal from the sentence, and the respondent's brief makes no effort to articulate why it would be proper for this court to address the Attorney General's sentencing claim for the first time, in Guzman's appeal. For example, the Attorney General does not argue the trial court imposed an unauthorized sentence, a claim which can be raised at any time. (See, e.g. *People v. Garza* (2003) 107 Cal.App.4th 1081, 1091.) " ' "[I]ssues do not have a life of their own: if they are

not raised or supported by [substantive] argument or citation to authority, we consider the issues waived." ' " (*Upshaw v. Superior Court* (2018) 22 Cal.App.5th 489, 504, fn. 7.)

## DISPOSITION

The judgment is modified to strike the jury's finding regarding the use of obscene material in the commission of count 6 (§ 1203.066, subd. (a)(9)) and the jury's multiple victim finding in count 9 (§ 667.61, subd. (e)). In all other respect, the judgment is affirmed.

_____
Jones, P.J.

We concur:

_____
Needham, J.

_____
Bruiniers, J.*

A150834

* Retired Associate Justice of the Court of Appeal, First Appellate District, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.